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SUPREME COURT, U. S.

In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-6301

HELIX MILLING COMPANY,

Respondent,

v.

TERMINAL FLOUR MILLS CO.
and GENERAL FOODS CORPORATION,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court
of the United States

OCTOBER TERM, 1975

No.

HELIX MILLING COMPANY,

Respondent,

v.

TERMINAL FLOUR MILLS CO
and GENERAL FOODS CORPORATION,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Terminal Flour Mills Co. and General Foods Corporation pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed September 18, 1975.

OPINIONS BELOW

A copy of the Opinion of the District Court for the District of Oregon, dated February 6, 1973, granting Petitioners' motions for summary judgment, is attached hereto as Appendix B, *infra*, A 14.

The opinion of the Court of Appeals, filed on September 18, 1975, is not yet officially reported. A copy is attached hereto as Appendix A, *infra*, A 1. This opinion superseded a prior opinion dated June 16, 1975.[1]

JURISDICTION

The Court of Appeals entered its first opinion on June 16, 1975. Petitioners filed timely petitions for rehearing and suggestions for rehearing *in banc*, which were denied on September 18, 1975. Simultaneously the Court entered a second opinion which superseded its earlier opinion. A copy of the order denying the petitions for rehearing is attached hereto as Appendix C, *infra*, A 19. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Can an unconsummated and aborted agreement, entered into without any anticompetitive purpose, under which a company withdrawing from a concentrated industry agrees to sell its production facility to a competitor rather than a potential competitor, violate Section 1 of the Sherman Act?

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[1] The opinion of June 16, 1975 is reported in 1975 Trade Cases ¶60,372.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, is set forth in Appendix D, *infra*, A 20.

STATEMENT OF THE CASE

1. Factual Background

This is an action by Respondent to enforce a purported contract and for injunctive relief and treble damages for alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The antitrust jurisdiction of the District Court was invoked under 15 U.S.C. §§15 and 26 (R. 1).

Petitioners Terminal Flour Mills Co. ("Terminal") and General Foods Corporation ("General") are competitors in the flour and millfeed markets in the Pacific Northwest, other western states, and the Pacific export market.

Until March 15, 1969, Respondent was in the same business, producing flour and millfeed at a mill at Helix, Oregon. On that date the Helix mill was destroyed by fire. Helix wanted to replace the mill and reenter the business, and it entered into negotiations to buy General's Igleheart mill at Pendleton, Oregon, which General wanted to sell because it was not meeting its profit objectives (A 2, 14). Terminal also wanted to buy the mill to replace one operated by Spokane Flour Mills Co., a company under common ownership with Terminal. The Spokane mill was obso-

lescent, and serious consideration was being given to closing it. It was in fact permanently closed on June 1, 1972 (R. 454, 455, 484).

After negotiations with both parties, General decided to sell the mill to Terminal. A written form of agreement was prepared, signed by General and forwarded to Terminal for execution (R. 75). Although Terminal did not sign it, Respondent filed this action on November 12, 1969 (A 2, 14, 15).

General denied that it was obligated to sell the mill to Terminal and refused to do so (R. 523, 654). However, Terminal contended it had an enforceable right to buy the mill and cross-claimed for specific performance (A 2, 15; R. 69, 74-76, 105, 107, 111, 127).

The mill was never sold to Terminal, and Terminal never acquired any operational control over it. Throughout, General has continued to own and operate the mill for its own account (A 15; R. 641). Except for the closure of the Spokane mill previously noted, the market has remained unchanged.

At a pretrial hearing on November 8, 1972, a motion by Terminal to dismiss its cross-claim for specific performance and its counterclaim against Respondent was granted (R. 528). Thereafter, after extensive discovery,[2] Petitioners filed motions under

[2] The Record consists of five sets of interrogatories and answers, and nine depositions of virtually all the individuals concerned in this matter. Full documentary discovery was also had. Except for testimony of economists as to relevant markets, the case was fully prepared for trial when the motions for summary judgment were filed.

Rule 56, F.R.Civ.P., for summary judgment on the antitrust counts in Respondent's complaint.

In the District Court, Respondent abandoned its claim that Terminal attempted to monopolize the flour and millfeed markets in violation of Section 2 of the Sherman Act.[3] It has also abandoned its claim to enforce an alleged agreement with General to purchase the mill.

2. The Decision of the District Court

The District Court granted Petitioners' motions for summary judgment on Respondent's antitrust allegations and dismissed Respondent's claim for damages under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

After noting that Respondent's only claim under Section 1 of the Sherman Act was that the unconsummated contract prevented it from reentering the market, the District Court concluded that there had been no violation of Section 1 as a matter of law because "[t]his is not a case in which Terminal and General Foods tried to keep Helix out of the market by agreeing that neither would sell its mills [*sic*] to Helix." (A 17). That determination of the intent of the parties has never been questioned.

The District Court also held that Respondent had abandoned its claim of attempted monopolization un-

[3] R. 10; Transcript in supplemental Record dated January 23, 1973 (p. 28). Respondent's common law claims remain pending and are not involved in this Petition.

der Section 2 of the Sherman Act (A 17). Finally, the District Court held that Petitioners were entitled to summary judgment on the claim under Section 7 of the Clayton Act because the planned acquisition was abandoned and Terminal never acquired or exercised any control over the mill (A 16). It entered partial final judgment under Rule 54(b), F.R. Civ.P., on all of Respondent's antitrust claims. (See Appendix B, *infra*, A 14).

3. The Decision of the Court of Appeals

Respondent appealed to the Court of Appeals for the Ninth Circuit under 28 U.S.C. §1291. On June 16, 1975, the Court of Appeals rendered an opinion affirming the decision of the District Court insofar as it dismissed Respondent's claim under Section 7 of the Clayton Act, but reversing the District Court ruling on Respondent's claim under Section 1 of the Sherman Act and remanding that claim for trial.

Petitioners filed timely petitions for rehearing and suggestions for a rehearing *in banc*. On September 18, 1975, the petitions were denied and the suggestions for a rehearing *in banc* were rejected. (See Appendix C, *infra*, A 19.) Simultaneously, however, the opinion of June 16, 1975 was withdrawn and a revised opinion was filed. (See Appendix A, *infra*, A 1.)

In its second opinion, the Court, as in its first opinion, affirmed the dismissal of Respondent's claim under Section 7 of the Clayton Act, but re-

versed and remanded the claim under Section 1 of the Sherman Act. The Court noted the "closed nature of the market" and the allegation that Respondent could reenter it only by purchasing General's mill and would have done so but for Petitioners' conduct, and it concluded that the District Court had erred in granting summary judgment on the Section 1 claim (A 5, 6, 9, 11). The Court held that the alleged agreement between Petitioners could violate Section 1 of the Sherman Act because it denied Respondent the chance to reenter the market (A. 11).

In its second opinion, the Court of Appeals noted that Respondent had abandoned its allegation that Petitioners acted with an anticompetitive purpose to exclude Respondent from the market, but concluded that such specific intent "need not be proven in the particular circumstances of this case" (A 10). Citing this Court's decisions in *Associated Press* v. *United States*[4] and *United States* v. *General Motors*,[5] the Court held that a jury could infer an anticompetitive intent merely from Petitioners' alleged agreement which operated to keep Respondent from reentering the market (A 8).

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[4] 326 U.S. 1 (1945).
[5] 384 U.S. 127 (1966).

REASONS FOR ALLOWING THE WRIT

The Ninth Circuit has held that an unconsummated acquisition agreement between competitors, one of whom is withdrawing from the market, which is entered into without any anticompetitive purpose but which operates to exclude a potential market entrant, can violate Section 1 of the Sherman Act. That decision announces a new and important principle of liability under the Sherman Act which should be reviewed by this Court.

1. The Decision is in Conflict with the Decisions of This Court and of Other Courts of Appeal.

While one of the problems with the decision of the Court of Appeals is the ambivalence between *per se* cases that it cites and the "rule of reason" that it applies, it finally embraces the "rule of reason" as the principle that is applicable to the case.

However, in applying the rule in *per se* cases, that an anticompetitive purpose is not necessary to a violation, to this case under the "rule of reason," the Court's decision is inconsistent with decisions of this Court and of other Courts of Appeal, as well as prior decisions of the Ninth Circuit itself.

The Court of Appeals' citations to *Associated Press* v. *United States, supra, International Salt Co.* v. *United States,*[6] *Radiant Burners* v. *Peoples Gas Light & Coke Co.,*[7] and *United States* v. *General Motors Corp., supra,* show the damaging confusion that has occurred. In each of those decisions, this Court held to be unlawful activities which it classified as

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[6] 332 U.S. 392 (1947).
[7] 364 U.S. 656 (1961).

per se violations "which from their 'nature or character' [are] unduly restrictive."[8] An unlawful purpose was not required, although in most of those decisions one might have been inferred from the facts.

Similarly, in *United States* v. *Hilton Hotels Corp.*,[9] the Ninth Circuit found a *per se* violation from proof that the primary purpose and effect of the activity involved was to exclude others from a market. The evidence established an agreement among the defendants, who enjoyed substantial economic power, to coerce others.

This, however, is not a *per se* case, and no charge of an anticompetitive purpose survived the District Court. *Per se* liability is necessarily limited to cases of exclusionary or coercive conduct having the primary purpose and effect of restraining or monopolizing interstate commerce.[10] Absent those factors, as in this case, the legality of a combination or agreement is judged by the "rule of reason," in which the primary consideration is defendants' purpose. The decision upon which the Court of Appeals placed primary reliance, *Poller* v. *Columbia Broadcasting Sys-*

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[8] *Radiant Burners* v. *Peoples Gas Light & Coke Co.*, *supra* at 659, quoting from *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).

[9] 467 F.2d 1000 (9th Cir. 1972), *cert den. sub nom Western International Hotels Co.* v. *United States*, 409 U.S. 1125 (1973).

[10] See *United States* v. *Hilton Hotels Corp.*, *supra* at 467 F.2d at 1002-4; *Cataphote Corp.* v. *DeSoto Chemical Coatings, Inc.*, 450 F.2d 769, 774 (9th Cir. 1971); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Man. Com.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. den.* 409 U.S. 1109 (1973).

tem, Inc.,[11] was such a "rule of reason" case in which this Court required proof of an anticompetitive purpose, the element which is admittedly lacking here.[12]

It is well-settled in other decisions of the Ninth Circuit[13] and of other circuits[14] that the mere existence of an agreement between market participants, as a result of which one of the participants refuses to deal with a third party, is insufficient by itself to show an anticompetitive motive so as to violate Section 1 of the Sherman Act. Such a refusal to deal is not an unreasonable restraint of trade merely because

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[11] 368 U.S. 464 (1962).

[12] In *Poller*, plaintiff alleged that the cancellation of an affiliation agreement was but one part of a larger conspiracy by the defendants to restrain and monopolize trade, and this Court, after closely analyzing the pleadings, depositions, affidavits and exhibits in the record, held that the record was replete with evidence of anticompetitive intent. 368 U.S. at 469-70.

[13] *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 74-80 (9th Cir. 1969), *cert. den.* 396 U.S. 1062 (1970); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972). *Accord, DeVoto v. Pacific Fidelity Life Insurance Co.*, 516 F.2d 1, 8 (9th Cir. 1975), *cert. den.* 10/14/75; *Bridge Corp. of America v. American Contract B. L., Inc.*, 428 F.2d 1365, 1369-70 (9th Cir. 1970), *cert. den.* 401 U.S. 940 (1971); *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery*, 454 F.2d 442, 452 (9th Cir. 1972).

[14] See, e.g., *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1316-18 (3rd Cir. 1975), *cert. filed* 8/12/75; *Burtett Sound Inc. v. Altec Corp.*, 1975-2 Trade Cases ¶60,404, p. 66,775 (5th Cir. 1975); *Worthen Bank & Trust Co. v. National BankAmericard Inc.*, 485 F.2d 119, 124-30 (8th Cir. 1973), *cert. den.* 415 U.S. 918 (1974). See also *Chastain v. American Telephone & Telegraph Co.*, 1975-2 Trade Cases ¶60,519, pp. 67,200-1 (D.D.C. 1975) and *Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc.*, 375 F. Supp. 1206, 1214-17 (S.D. N.Y. 1974).

there is injury to the business expectation of the third party.

Respondent has shown only a purported agreement between Petitioners and an alleged resulting foreclosure of Respondent from acquiring the mill.[18] The Court holds that such a bare agreement, without more, is sufficient evidence of an unlawful purpose or effect to constitute a violation of Section 1 of the Sherman Act, i.e., that the naked act of negotiating or contracting to sell an asset to one of two hopeful buyers can violate the law and give a cause of action to the disappointed buyer.[19]

In short, the decision is based on the existence of a factual issue (anticompetitive purpose) which the Court of Appeals suggests is not necessary to a violation, and which it concedes Respondent abandoned in the District Court for lack of evidence after full dis-

[18] The Court of Appeals refers to the market shares of Petitioners shown by Respondent's evidence (A 2, fn. 1). The apparent reason for this reference is to show that if two shares of the market came under one ownership, Terminal would increase its market share and thus, perhaps, violate Section 1 of the Sherman Act. However, as noted above, the evidence is uncontroverted that the mill was to serve as a replacement for an obsolescent mill of Spokane Flour Mills Co., a sister corporation of Terminal, which mill was to be (and has now been) closed.

[19] The ambiguity of the decision is compounded by the Court's application of another *per se* rule: that there need be no showing of "public injury" to support Respondent's claim (A 10). See *Kestenbaum* v. *Falstaff Brewing Corp.*, 1975-1 Trade Cases ¶60,371, pp. 66,618-19 (5th Cir. 1975); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F2d 566, 517-18 (6th Cir. 1972), *cert. den.* 409 U.S. 1001 (1972); *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F2d 636, 644 (5th Cir. 1959).

covery.[17] In holding that Petitioners' motives are an issue to try under Section 1 of the Sherman Act, the Court of Appeals ignored factual positions of the parties which were assumed after full discovery and stipulation of the basic facts.

The Court of Appeals' reliance on *United States* v. *Griffith*[18] is also misplaced. In *Griffith*, this Court focused on conspiratorial efforts of the defendants to further a monopoly. *Griffith* did not hold that a refusal to deal can violate Section 1 of the Sherman Act in the absence of an anticompetitive purpose. The Court of Appeals' reliance on *Griffith* will breed confusion regarding the element of intent in cases under Sections 1 and 2 of the Sherman Act.

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[17] A 10. While Respondent initially alleged a conspiracy to exclude it from the market (R 10), it has also abandoned that charge. In fact, Respondent has contended throughout that Petitioners' intentions are not relevant to the issue. By Respondent's own admission, this matter does not involve any combination or conspiracy or other conduct except the negotiation of the purported agreement itself [Transcripts in supplemental Record dated November 24, 1969 (p. 8), September 14, 1970 (p. 4), November 8, 1972 (pp. 35, 38), January 23, 1973 (pp. 27, 28, 33, 44, 45); R. 223, 225, 234].

[18] 334 U.S. 100 (1948).

2. The Practical Effect of the Decision is to Hamper Legitimate Business Acquisitions by Making Negotiations for a Sale or Merger betwen Existing Market Participants Vulnerable to Unfounded Claims under Section 1 of the Sherman Act.

In holding that the aborted and unperformed acquisition "agreement" between Petitioners, without more, can violate Section 1 of the Sherman Act, the Court of Appeals emphasized the "unusual factual context"[19] of the case because of an "allegedly closed market where acquisition is the only feasible means of entry."[20] However, this factual pattern is not at all uncommon, and it is precisely in such cases that the harshness of the decision and its hobbling effect on legitimate business acquisitions become most apparent.

In any concentrated market which one can enter or in which one can replace an obsolescent plant only by acquiring an existing plant, the decision places an established competitor—buyer or seller—on the horns of an unfair dilemma.

Under the Court of Appeals' decision, an existing competitor can negotiate to buy or sell a plant only so long as other potential entrants evince no interest. If a potential entrant shows interest, but ultimately the plant is not sold, suit can be filed based on negotiations that were not anticompetitive in purpose and did not in fact affect the market. This draconian penalty for innocent business conduct should be reviewed by this Court.

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[19] A 10.
[20] A 11.

3. The Decision Ignores the Statutory Pattern Laid Down by Congress to Control Mergers and Acquisitions under the Antitrust Laws.

The Court of Appeals has held that in the case of acquisitions there is, somewhere between a tendency toward monopoly (Section 7 of the Clayton Act, Appendix F, *infra*, A 23) and monopolization (Section 2 of the Sherman Act, Appendix E, *infra*, A 22), an amorphous middle ground, trespass on which is punishable under Section 1 of the Sherman Act.

As a matter of logic, there can be no middle ground between a tendency towards monopolization and monopolization itself. Section 7 of the Clayton Act and Section 2 of the Sherman Act were designed by Congress to cover the subject of injury to competition arising from acquisitions, whether planned or completed, between competitors.

Where a proposed but abandoned acquisition, free of anticompetitive purpose, is found not to have violated Section 7 of the Clayton Act, and is conceded not to have violated Section 2 of the Sherman Act, the logical conclusion, and one reached by the District Court, is that there can be no violation of Section 1 of the Sherman Act.

The contrary holding of the Court of Appeals will create uncertainty and confusion in the law and in the business community. It declares, in effect, that there is some level of activity in the acquisition setting which falls short of violating Section 2 of the Sherman Act, and which is not within the ambit of Section

7 of the Clayton Act, but which can nevertheless entitle a private plaintiff to treble damages under Section 1 of the Sherman Act.

This is a major departure in the law and should be reviewed by this Court.

4. The Question Presented by This Petition is An Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question which is raised by the Ninth Circuit's decision and which is presented by this Petition—whether an exclusionary or anticompetitive purpose is a prerequisite of a violation of Section 1 of the Sherman Act in the case of a joint refusal to deal — is presently before this Court in a petition for a writ of certiorari in a case from the Third Circuit Court of Appeals.[21] That case and this one together demonstrate the confusion in this area of the law and the need for a resolution of the issue by this Court.

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[21] *De Filippo* v. *Ford Motor Co., supra* (Docket No. 75-229).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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October 27, 1975.

APPENDIX A

Opinion of the Court of Appeals
Filed September 18, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELIX MILLING COMPANY, Plaintiff-Appellant,
v.
TERMINAL FLOUR MILLS CO. and GENERAL FOODS CORPORATION, Defendants-Appellees.

No. 73-1831

OPINION

Appeal from the United States District Court
for the District of Oregon

Before: BROWNING and WRIGHT, Circuit Judges, and LINDBERG, District Judge.*

WRIGHT, Circuit Judge:

Plaintiff Helix Milling Company (Helix) appeals the decision of the district court granting summary judgment and dismissing its claim for damages under § 1 of the Sherman Act [15 U.S.C. § 1] and § 7 of the Clayton Act [15 U.S.C. § 18]. We affirm the decision of the district court with respect to plaintiff's § 7 claim but reverse and remand with respect to its § 1 cause of action.

Helix operated a mill in Oregon for flour and mill-feed which was destroyed by fire. Plaintiff alleged that the only feasible way to continue its milling and

* Senior District Judge, Western District of Washington.

sales business was to acquire the assets of an existing mill in the Pacific Northwest. The cost of constructing a new mill was considered too great with respect to its limited profitability. Hence Helix approached defendant General Foods with an offer to purchase its Igleheart mill at Pendleton, Oregon (which General desired to sell because it was not meeting its profit objectives). About the same time, defendant Terminal Flour Mills initiated negotiations with General to purchase the Igleheart mill.[1]

General and Terminal ultimately reached an agreement. General signed a contract to sell the Igleheart mill and sent it to Terminal for signature. Helix then sued to enjoin the acquisition and for damages for violation of § 1 of the Sherman Act and § 7 of the Clayton Act as well for pendent claims based on unfair competition and trade defamation.

General subsequently sought to revoke its acceptance of Terminal's offer to purchase. However, Terminal indicated its acceptance of the contract, without signing it, and cross-complained for specific performance. After three years of litigation, Terminal dropped its cross-complaint and moved for summary judgment on the grounds that there could be no § 7 violation without a completed acquisition and that the

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[1] Plaintiff offered to prove that at this time Terminal and General were two of the five remaining competitors for the Pacific Northwest flour and millfeed market, with Terminal holding 19.6% and General 10.3% of the market. It also alleged that General held 8% and Terminal 64% of the submarket for sales to the Defense Supply Agency, a market in which Helix had provided 56% of the sales prior to the destruction of its mill.

attempted acquisition could not have violated § 1. The district court granted both motions.

Under Rule 56(c), F. R. Civ. P., summary judgment should be granted where the record shows "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As this court noted in *Bushie* v. *Stenocord Corporation*, 460 F.2d 116, 119 (9th Cir. 1972):

> The showing of a "genuine issue for trial" is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.

Quoting *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905 (9th Cir. 1968).

1. *SHERMAN ACT CLAIM.*

The plaintiff alleged that there was a Pacific Northwest flour and millfeed market as well as a submarket for sales to the Defense Supply Agency for which it and Terminal's sister corporation were the major suppliers. It asserted that the only feasible means to re-enter the market was to purchase an existing mill to supply its sales organization. It argued that the purchase of the only available mill by Terminal would necessarily have excluded it from the market and prevented it from resuming its pre-fire competition with Terminal.

Helix further alleged that, but for the contract be-

tween Terminal and General, it would have purchased the Igleheart mill. Plaintiff argues that the acquisition of the mill by Terminal would have violated both § 1 of the Sherman Act and § 7 of the Clayton Act.

In essence then, Helix alleged that there was a contract, combination or conspiracy to enter into an illegal acquisition which necessarily would exclude Helix from the Pacific Northwest flour and millfeed market and the regional submarket for DSA sales.

A major purpose of § 1 of the Sherman Act is to foster competition and to protect the ability of competitors to enter markets. In *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court held invalid an AP by-law which permitted members to impose significant, often prohibitive, penalties on potential competitors seeking to join the organizaton. The Court stated:

> Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect.

326 U.S. at 13-14.

In a variety of contexts the courts have struck down collaborative actions which prevented competitors from entering a given market, *Associated Press, supra; United States* v. *General Motors*, 384 U.S. 127, 145 (1966); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656

(1961); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *Cataphote Corp.* v. *DeSoto Chemical Coatings, Inc.*, 450 F.2d 769, 774 (9th Cir. 1971), *cert. denied* 408 U.S. 929 (1972); *cf. Gough* v. *Rossmoor Corp.*, 487 F.2d 373, 378 (9th Cir. 1973).

Here the plaintiff argues that the defendants combined and used a contract of sale to exclude it from the Pacific Northwest flour and millfeed market. In a closed market, where the acquisition of existing production facilities is the only economically feasible method of entry, an agreement to acquire the only available facilities necessarily excludes a potential entrant.

The issue before us then is whether the agreement and contract between Terminal and General in November of 1969 was a restraint of trade or was merely "joint activity having a primary purpose and direct effect of accomplishing a legitimate business objective [having] an incidental and indirect effect upon the business of some competitors." *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1003 (9th Cir. 1972), *cert. denied sub nom Western International Hotels Co.* v. *United States*, 409 U.S. 1125 (1973); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970).

It is no answer that plaintiff's suit aborted the acquisition with the result that Terminal never controlled the Igleheart mill and that the public retained

the benefits of two competing mills. *See Poller*, *supra*, at 473. The Sherman Act prohibits competitors from selecting who or what their competition will be, *Associated Press*, *supra*. This is particularly significant here where Helix alleges the existence of a submarket in which it was Terminal's major competitor and in which General played an insignificant role.

Defendants argue that our decision in *Hawaiian Oke* precludes a finding of a forbidden restraint of trade. *Hawaiian Oke* permitted the decision of a manufacturer to switch distributors for its product even though this meant excluding its former distributor from the market. This conclusion was conditioned, however, on the absence of "an adverse purpose or effect on competition." 416 F.2d at 78.

A jury could find such an unreasonable restraint of trade as a necessary consequence of the fact that Helix would have purchased the mill but for General's decision to sell it to Terminal, and that defendants' course of action would necessarily exclude competition from the market because of the closed nature of the market.

In *Hawaiian Oke*, the principal defendant was not in competition with the plaintiff. In *Poller* and *Bushie*, the defendants cancelled vertical arrangements with the plaintiffs in order to assume that business themselves. In *Poller*, CBS allegedly cancelled its affiliation with a UHF station, purchased a competing UHF license, and then purchased the assets of its former affiliate at distress prices in order to operate

a UHF outlet for its programs in that market. In *Bushie*, the defendant cancelled its regional distributorship and opened a branch office to conduct a distribution business itself.

In the former case, the Supreme Court concluded that

> . . . if such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law.

368 U.S. at 468-469.

In *Poller*, the Court found that there was sufficient evidence from which a jury might have concluded that CBS intended to restrain trade in the relevant UHF market by eliminating independent UHF and destroying its former affiliate's business, 368 U.S. at 470-473. The Court held that it had been improper to grant a summary judgment and remanded the case for trial. *Id.*

In *Bushie*, the court found that there was no evidence that the cancellation restrained trade or was motivated by anticompetitive intent, 460 F.2d at 119. All the plaintiff adduced there was the fact of cancellation and the subsequent intiation of a branch office to conduct the distributing business.

The plaintiff here has alleged that the defendants restrained trade by entering a contract for an acquisition which would have violated § 1 of the Sherman

Act,[2] and the necessary effect of which would be to exclude plaintiff from the markets in question. As the Court noted in *United States* v. *Griffith*, 334 U.S. 100, 105 (1948):

> It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.

A jury could find here such anticompetitive intent from defendants' action in agreeing to a course of action which would necessarily exclude Helix from the market, *Associated Press, supra; General Motors, supra*, and whose succeessful attainment would result in an acquisition which could be found to involve a violation of § 1. The plaintiff has alleged the necessary market and the substantial shares of those markets held by General and Terminal. As the Court noted in *United States* v. *First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 671-672 (1964), speaking of the railroad merger cases:

> . . . where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act.

Given the plaintiff's allegation and offer of evidence, it was error to grant summary judgment.

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[2] *United States* v. *First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 671 (1964).

The district court also noted that, in order to find a combination in this case, it would have been necessary to prove an agreement between defendants that neither of their mills would be sold to Helix. This misstates the rule. Proof of participation in a course of conduct that has the necessary consequence of barring entry of competition into the market would provide the basis for a finding of a combination. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149-150 (1968); *Pearl Brewing Co.* v. *Anheauser-Busch Co.*, 339 F. Supp. 945, 950 (S. D. Texas, 1972). The collaboration of the person necessary to establish a combination need not even be willing, *Albrecht* at 150 n.6.

Similarly, plaintiff introduced evidence that defendants entered into a contract[3] to complete the acquisition, signed by General, against whom enforcement was sought by Terminal for three years following the initial agreement. The plaintiff argues that this contract excluded it from the market and that Terminal's action in seeking specific performance extended the exclusionary impact beyond the period of the initial agreement. The effect on Helix is alleged to be the same as though the acquisition had been completed. It was excluded from the market in either event.

Hence there was evidence which, interpreted in the light most favorable to the plaintiff, would support a finding of a contract or combination to re-

[3] We have held that the term "contract" should be interpreted broadly, *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F.2d 21, 30 (9th Cir.), *cert. den.* 403 U.S. 906 (1971).

strain trade. It was error to prevent the plaintiff from attempting to prove this claim.

Since such a finding of the exclusion of a competition [*sic*] by collaborative action having the necessary effect of restraining trade would violate the Sherman Act, no additional showing of "public injury" is necessary to support a private action for damages. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, *supra*, 364 U.S. at 660; *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 517-18 (6th Cir., 1972), *quoting Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636 (5th Cir. 1959); *Switzer Brothers, Inc.* v. *Locklin*, 297 F.2d 39, 47 (7th Cir. 1961). *See also Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709, 727-28 (9th Cir. 1959).

Plaintiff, of course, must prove that it would have purchased the mill but for the contract between Terminal and General. This involves proof both that General would have made the sale and that Helix would have been able to purchase it and re-enter the milling and sales market, *see Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. den.* 385 U.S. 991 (1966), *reh. denied* 386 U.S. 930 (1967).

Our holding is a limited one, given the unusual factual context of this case. We are not unmindful of the fact that Helix has abandoned its allegation that defendants acted with the specific anticompetitive purpose of excluding it from the market. We hold that such a specific intent need not be proven in the particular circumstances of this case.

We are faced here with an allegedly closed market where acquisition is the only feasible means of entry. Plaintiff alleges that but for the actions of the defendants, including the aborted contract of sale, it would have purchased the only available productive facility and resumed competition within the market in question. In such a factual setting, where entry to the market by the plaintiff allegedly is prevented by a marger or acquisition which would violate § 1 of the Sherman Act and where the defendants were aware of the bid by the plaintiff, there is a Sherman Act § 1 cause of action.[4]

II. *CLAYTON ACT CLAIM.*

The district court granted summary judgment for the defendants on the Clayton Act § 7 claim, basing its decision on the fact that no acquisition had taken place. We affirm.

It has long been established that there is a private cause of action for damages under § 7, *Carlson Companies, Inc.* v. *Sperry and Hutchinson Co.*, CCH 1974-2 Trade Cases ¶ 75,428 (8th Cir. 1974); *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th

[4] We express no view as to whether the doctrine discussed in *Rex Chainbelt Inc.* v. *Harco Products, Inc.*, 512 F.2d 993 (9th Cir. 1975), decided after this case was submitted, may affect any claim to damages resulting from the assertion by Terminal of its counterclaim and General Foods' refusal to sell the mill to Helix while that counterclaim was pending. *See also Ansul Co.* v. *Uniroyal Inc.*, 448 F.2d 872, 882 (2d Cir. 1971); *Kobe* v. *Dempsey Pump Co.*, 198 F.2d 416, 424-25 (10th Cir. 1952).

Cir. 1967); *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 340 F. Supp. 76 (N.D. Cal. 1972); *Kirihara* v. *Bendix Corp.*, 306 F. Supp. 72 (D. Haw. 1969); *Isador Weinstein Investment Co.* v. *Hearst Corp.*, 310 F. Supp. 390 (N.D. Cal., 1970). *Zenith Vinyl Fabrics Corp.* v. *Ford Motor Co.*, 357 F. Supp. 133, 136 (E.D. Mich. S. D. 1973).

A claim has been permitted, however, only in cases in which an acquisition has been completed. In the only case in which damages were sought for an uncompleted merger, *GAF Corp.* v. *Circle Floor Co.*, 329 F. Supp. 823, 829 (S.D.N.Y. 1971), the court held that no cause could be allowed because the possibility of proving damages was too remote. The Second Circuit affirmed on the ground that no competitive injury had been alleged, 463 F.2d 752, 758-759 (2d Cir. 1972). In *Carlson*, the court implied that only a completed merger could provide a cause of action for damages.

The language of § 7 speaks in terms of a completed acquisition rather than an attempted merger.[5] We can find no compelling reason for extending the reach of § 7 to an uncompleted merger.

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[5] 15 U.S.C. § 18 (1974):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The decision of the district court is affirmed as to plaintiff's § 7 claim and reversed and remanded as to its § 1 claim.

APPENDIX B

Opinion of the United States District Court
Dated February 6, 1973*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HELIX MILLING COMPANY, Plaintiff,	)	Civil No. 69-645
v.	)	
	)	OPINION
TERMINAL FLOUR MILLS CO. and GENERAL FOODS CORPORATION, Defendants.	)	February 6, 1973

SOLOMON, Judge:

This case is before the Court on defendants' motion for summary judgment on plaintiff's antitrust claims.

On March 15, 1969, fire destroyed the Helix Milling Company (Helix) flour mill in Helix, Oregon. Helix was eager to replace the mill, and the company negotiated to buy a mill owned by General Foods in Iglehart, Oregon. During the negotiations between Helix and General Foods, Terminal Flour Mills Company (Terminal) decided that it would also like to purchase the Iglehart mill.

After negotiating with both Terminal and Helix, General Foods decided to sell the mill to Terminal. Helix asserts that General Foods signed a contract of sale and submitted it to Terminal. On November 12,

* The Opinion as set forth herein contains minor amendments which were made pursuant to the District Court's Order dated February 16, 1973.

1969, Helix filed this action charging the defendants with fraud, misrepresentation, unfair competition, and trade defamation and alleging promissory estoppel against General Foods. Helix also claims that Terminal and General Foods violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) and Section 7 of the Clayton Act (15 U.S.C. § 18). Helix sought damages and a decree enjoining the sale to Terminal and requiring General Foods to sell the Iglehart mill to Helix.

When Helix filed its complaint, General Foods told Terminal not to sign the contract, and Terminal did not sign. Nevertheless, Terminal contended that it had an enforceable contract to buy the mill, and Terminal cross-claimed against General Foods to obtain specific performance. Terminal recently withdrew its cross-complaint and dropped its request for specific performance.

General Foods has continued to operate the Iglehart mill. Helix does not assert that Terminal acquired any operational control over the mill.

Section 7 of the Clayton Act prohibits a corporation, in some situations, from *acquiring* the assets or stock of another corporation if the *acquisition* might have anti-competitive effects. Helix contends that it is entitled to damages under Section 7 because Terminal acquired a "bundle of rights" and an enforceable contract during the negotiations between Terminal and General Foods.

Helix asserts in its complaint that there was a "proposed acquisition." General Foods has always con-

tended, and Terminal now agrees, that an enforceable contract did not exist. Terminal did not sign the contract, and the facts alleged by Helix are inadequate to find an enforceable contract.

Even if the contract was enforceable, or even if Terminal had signed the contract, the bare contract without more would not constitute a Section 7 acquisition. Terminal would have to exercise, or have the privilege to exercise, some actual control of the Iglehart mill.

Clayton 7 only prohibits the acquisition, not the sale, of stock or assets. Helix admits that no case has allowed damages under Section 7 against the selling corporation. General Foods is therefore entitled to summary judgment on the Clayton 7 claim for this additional reason.

Defendants contend they are also entitled to summary judgment on the Clayton 7 count because damages cannot be recovered for a Clayton violation. The Ninth Circuit has not yet decided this question, and I do not have to reach it now since no acquisition occurred in this case.

Helix's Sherman 1 claim is defective for many of the same reasons. Helix does not allege facts sufficient to show a "contract, combination . . ., or conspiracy in restraint of trade or commerce."

Helix contends that the inchoate contract prevented it from reentering the market and, therefore, was "in restraint of trade or commerce" to its damage.

This is not a case in which Terminal and General Foods tried to keep Helix out of the market by agreeing that neither would sell its mills to Helix. On the admitted facts there was no conspiracy here.

Helix has abandoned its third antitrust claim, the Sherman 2 count.

I have considered all of the pleadings, including the contentions filed by the parties. I have not set out all the reasons for granting defendants' motion. The trial is scheduled soon, and a prompt decision on these issues is more important than a lengthy discussion of each claim. Counsel for all the parties are able and well versed in antitrust law. They do not need an elaborate opinion from me to effectively present their claims in the Court of Appeals. I believe a final judgment on these claims is appropriate at this time under Fed. R. Civ. P. 54(b). Helix asserts its other claims only against General, and these claims are based on different factual issues.

The motion for partial summary judgment is granted. The claims based on Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act are dismissed.

Dated this 6th day of February, 1973.

/s/ Gus J. Solomon
GUS J. SOLOMON
United States District Judge

Judgment of the United States District Court
Dated February 6, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HELIX MILLING COMPANY, Plaintiff,	)	Civil No.
v.	)	69-645
TERMINAL FLOUR MILLS CO. and GENERAL FOODS CORPORATION, Defendants.	)	JUDGMENT

For the reasons set forth in the Court's opinion filed today,

The motion of each defendant for a summary judgment in its favor and against the plaintiff on plaintiff's claims alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) and Section 7 of the Clayton Act (15 U.S.C. § 18) is granted; they are counts I and II of plaintiff's complaint.

This is a final judgment on the claims set forth in counts I and II, and there is no just reason for delaying the entry of this judgment upon such claims.

IT IS ORDERED that this judgment be entered this day as a final judgment under Fed. R. Civ. P. 54(b) on the claims and counts described above.

Dated this 6th day of February, 1973.

/s/ Gus J. Solomon
GUS J. SOLOMON
United States District Judge

APPENDIX C

Order of the United States Court of Appeals
Filed September 18, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELIX MILLING COMPANY, Plaintiff-Appellant,	)	
v.	)	No. 73-1831
TERMINAL FLOUR MILLS CO. and GENERAL FOODS CORPORATION, Defendants-Appellees.	)	ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and LINDBERG, District Judge.

The court's opinion of June 16, 1975 is hereby withdrawn. A revised opinion is filed herewith.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Browning and Wright have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

Section 1 of the Sherman Act, 15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every

person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX E

Section 2 of the Sherman Act, 15 U.S.C. § 2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commence among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX F

Section 7 of the Clayton Act, 15 U.S.C. § 18

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

". . . ."